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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ADOLFO SANCHEZ and LUIS HERRERA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners petition for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit in this case.

QUESTIONS PRESENTED

1. Whether this Court's decision in Illinois v. Gates, __ U.S. __, 76 L.Ed.2d 527, 547 (1983) in which it was stated that "after-the-fact scrutiny by the courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's determination of probable cause should be paid great deference by reviewing courts," means that:

A district court which permissably concludes, after a careful and intelligent review of a warrant affidavit, that the warrant was invalid must nevertheless defer to the issuing magistrate's determination of probable cause?

2. Whether this Court's decision in Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978) that the critical element in a reasonable search is not that the owner of the property is suspected of a crime but that there is reasonable cause to believe that the specific "things" to be searched for and seized are located on the property to which entry is sought, means that:

The failure in a supporting affidavit to connect the individual whose telephone conversations are to be seized and the failure to establish the individual's connection to the communication facility and/or residence wherein the facility is located is not determinative of the issue of probable cause whenever there is an allegation of a conspiracy if it can be shown that a member of the conspiracy communicated over the facility to be wiretapped?

LIST OF ALL PARTIES

Petitioners:

Adolfo Sanchez

Luis Herrera

Respondent:

United States of America

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Cases:

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U.S. v. Tehfe, et als., Indictment No. 83-37, Memorandum Opinion, (D.C.N.J.),decided 6/15/83..4,et passim

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Constitution and Statutes:

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OPINIONS BELOW

The opinion of the Court of Appeals dated December 6, 1983, from which this petition is filed, is not yet reported. (See Slip Opinion, Appendix A, infra, 1a et seq.) The opinion and order of the district court dated June 15, 1983 (Appendix B, infra, 14a et seq.) are not reported. The opinion of the district court on the Government's motion for reconsideration dated July 15, 1983 (Appendix C, infra, 71a et seq.) is not reported.

JURISDICTION

The judgment of the Court of Appeals was rendered on December 6, 1983.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Petitioners Sanchez and Herrera were indicted on February 18, 1983, in the District of New Jersey, for conspiracy and various violations of the federal narcotics laws. On June 15, 1983 the district court filed an opinion and order (infra, 14a-70a) granting the petitioner Sanchez's motion to suppress the evidence derived from the interception of telephone conversations on telephone number

201-865-8677 located at 517 22nd Street, Union City, New Jersey.

The respondent United States appealed the decision of the district court and on December 6, 1983 the Court of Appeals vacated the suppression order holding that the state judge who approved the wiretap properly found probable cause to believe that the telephone in question was being used in a continuing criminal enterprise. (infra, 2a)

On January 21, 1983 an order was issued authorizing the interception of wire communications to and from telephone number 201-865-8677 registered to R. Sanchez at 517 22nd Street. The affidavit of Hudson County Prosecutor's Investigator Pamela Resch was submitted in support of the application for a search warrant.

The supporting affidavit consisted of 29 pages in the form of 67 separate paragraphs. The first 37 paragraphs

described the narcotics related activities of a John Tehfe and other named individuals and makes no mention of the petitioners. (infra, 30a-31a)

In paragraph 8 of the affidavit it was stated that the "investigation which is the subject of [the] Application commenced in October 1982" and in paragraph 38 it was asserted that a confidential informant, denoted "CI-3," provided information concerning the subjects of the instant application "[p]rior to the full blossoming of the present investigation." CI-3's information contained in paragraphs 39 and 40 is the only facially incriminating information in the entire affidavit concerning the petitioner Sanchez. The information was, as follows:

> "39. CI-3 stated to members of this office that he had personal knowledge of individuals who were distributing heroin from 151-48th Street, Union City, New Jersey and 517-22nd Street, Union City, New Jersey. These individuals were known to CI-3 only as

"Fifu and "Andres."[1] CI-3 was told by these people that he could contact them at telephone number (201) 867-3521.

"40. CI-3 has acquired this information as a result of personal contact and association with these individuals. CI-3 has had conversations with "Fifu" and "Andres" concerning the purchase of heroin from them. During the course of these negotiations, CI-3 was told that the heroin supply for these individuals was somewhere in the Mid-West. CI-3 knows other individuals who have conducted drug transactions with these two men."

(infra, 31a-32a)

The district court analyzed the information provided by CI-3 in the context of the entire affidavit and concluded:

"The affidavit ... provides no information as to the date or dates upon which CI-3 conversed with Sanchez about the purchase of heroin from Sanchez and Andres. Similarly, the affidavit is silent as to when CI-3 gained his 'personal knowledge' that Sanchez was distributing heroin from the premises at 517-22nd Street. The affidavit does state that CI-3

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1. CI-3 identified "Fifu" as the petitioner Sanchez and "Andres" as Andres Gueche from photos.

made his report 'prior to the full blossoming of the present investigation.' The affidavit, however, presents no clear, unambiguous indication of when the investigation fully blossomed. Paragraph 8 of the affidavit suggests that the present investigation commenced in October 1982. Many of the activities described in the affidavit, including investigative acts by various state or federal officials, transpired in the months before October 1982. In light of the entire affidavit, one cannot reasonably conclude that the 'blossoming' of the investigation occurred after October 1982. If there is any inference available, it is that the 'full blossoming' of the investigation, prior to which CI-3 made his report, occurred in or before October, 1982. Thus, the affidavit ultimately informs us that CI-3 made his report on Sanchez in or before October 1982. Perhaps more important, this somewhat tortured analysis does not indicate when the events related by CI-3 actually occurred. At its best, then, the affidavit merely establishes that, in or before October, 1982, CI-3 supplied information concerning conversations with Sanchez. But the affidavit does not establish when the incriminating conversation or conversations with Sanchez took place.

(infra, 32a to 34a)

In paragraph 51, it was stated that

in investigator for the Hudson County

Prosector's Office observed Sanchez entering John Tehfe's house, on an unspecified date, "following an interview with Samira Tehfe concerning the death of Havi Dbouk." Paragraph 8 of the affidavit suggests that the interview with Samira Tehfe occurred in or about October, 1982. The investigator who made the undated observation of a male entering Tehfe's home identified that individual as the petitioner Sachez from a photograph. The date of the investigator's identification was not provided in the affidavit.

On December 10, 1982, Libio Carcasses who had previously been convicted for the unlawful possession of 175 pounds of marijuana was seen entering 517 22nd Street, Union City, New Jersey. The affidavit never alleged or established that the petitioner Sanchez lived at 517-22nd

Street, Union City, New Jersey.[2]

The district court in analyzing the significance of the citing of Carcasses at 517 22nd Street, stated as follows:

> "However, the affidavit nowhere established that Sanchez lived at 517 22nd Street, so the probative value of Carcasses' presence there is diminished. Only the cryptically described report of CI-3 places Sanchez at that address. The informant, according to the affidavit's paragraph 39, had 'personal knowledge' that Sanchez was distributing heroin from those premises. But the affidavit does not explain the source of CI-3's personal knowledge, except arguably for mention of the conver-

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2. In paragraph 41 of the affidavit, it was stated that telephone number 201-865-8677 registered to a R. Sanchez at 517 22nd Street, Union City, New Jersey, and that telephone number 201-867-3521 was registered to A. Sanchez at 151-48th Street, Union City, New Jersey. The only connection of A. Sanchez, as opposed to Adolfo Sanchez, shown in the affidavit to 517 22nd Street, Union City, New Jersey, was that R. Sanchez used A. Sanchez as a reference with the phone company. The affidavit never established Adolfo Sanchez to be the "A. Sanchez" residing at 151 48th Street.

(infra, fn 4, 35a-36a)

sations on an unspecified date with Sanchez 'concerning the purchase of heroin' from Sanchez and Andre. As noted above, not only are those conversations undated, but, as the affidavit recounts it, the conversations do not include information placing Sanchez at 517 22nd Street.

"One can argue ... that conversation with Sanchez was the source of the informant's 'personal knowledge' that Sanchez was distributing drugs from 517 22nd Street. But that is at best a plausible inference, belied by the affidavit itself. Had that been the case, one reasonably would think that, with such crucial, site-related intelligence, the affiant would clearly have stated it. Moreover, the paragraphs in question also provide a suggestion that some of CI-3's information came through unidentified contacts in the community: 'CI-3 also knows other individuals who have conducted drug transactions with ... (Sanchez and Andre).' Resch Affidavit, Par. 40. The reader must speculate whether such hearsay, -- which could be the casual rumor that does not establish probable cause, see U.S. v. Karanthanos, 531 F.2d 26,31 (2d Cir. 1976), cert.denied, 428 U.S. 910, -- was the source of the information placing Sanchez's drug dealings at the subject address.

"Thus the information of December 10, 1982, placing Carcasses at 517 22nd Street, says very little about Sanchez; at best, by a generous

reading of the affidavit, it shows that Carcasses visited a building from which Sanchez was said to have dealt in narcotics at some unspecified time."

(infra, 35a-38a)

The affidavit goes on to outline that a check of the telephone toll records of 201-865-8677 located at 517 22nd Street, Union City, New Jersey and 201-865-1964, Betty Fashions' telephone number, which number the affidavit alleges John Tehfe used, indicates that calls were placed on both telephones to common telephone numbers belonging to drug violators. Furthermore, the affidavit asserted that the toll records of 201-865-8677 and 201-865-1375, the latter number being registered to John Tehfe, contained the common number of 212-568-7714, a telephone number registered to Victor's Cafe at 236 52nd Street, New York, New York, an establishment which the affiant asserts is "frequented by known drug violators."

The affidavit failed to date the telephone calls cited in the analysis of toll records, a failure which was commented upon by the district court judge:

> "The [telephone] records do suggest some associational ties between John Tehfe, the business Betty Fashions, and someone who used the telephone at 517 22nd Street. But without specific dates, even the relevance of associational information is diminished. Also, without information linking the calls from 517 22nd Street to a particular individual (Sanchez) then significance in an assessment of probable cause declines."
>
> (infra, 39a)

Lastly, the affidavit states that a pen register revealed that three (3) telephone calls were placed from Tehfe's home to 201-865-8677 the week prior to submission of the warrant application.

The district court in rejecting the Government's argument that the affidavit contained information which updated CI-3's undated information and demonstrated on-

going criminal activity stated:

> "As noted above, the crucial information supplied by CI-3 is undated but inferentially appears to have been supplied no less than 100 days before the application. Evidence of association between Sanchez and certain known drug violators, or Sanchez and Tehfe -- at best corrobative information insufficient to establish probable cause -- is either undated or of similar vintage, except for the January telephone call.
>
> "But even the comparatively recent evidence of association between Tehfe and Sanchez or Carcasses and Sanchez is weak. For the affidavit fails to establish either that Sanchez resided at, or was in January 1983 using for drug transactions, the premises at 517 22nd Street. CI-3's report claims 'personal knowledge' that Sanchez was selling drugs from that address. The only arguable basis for that personal knowledge were the 'conversations' mentioned in paragraph 40 between Sanchez and CI-3. Those conversations, as discussed above, occurred at the latest 3 to 4 months before the warrant was issued. Those conversations do not show that Sanchez lived at 517 22nd Street; had they shown residence, one might infer that residence and therefore Sanchez's use of the premises continued into the time period significant for probable cause purposes. The report of the conver-

sations merely indicates that at some unspecified time months before the warrant application, Sanchez may have used the premises for drug transactions. CI-3's report gives no grounds for belief that Sanchez's use of the premises continued into a time zone meaningful to a determination of probable cause in January of 1983.

"Thus the affidavit gives little or no reason to assume that Sanchez, or any other identifiable and legitimate suspect, was using the target telephone to make or receive the telephone calls upon which the Government relies to update or corroborate the confidential informant's report.

"If the Resch affidavit established probable cause, it is only through the report of CI-3. But defendant's argument that CI-3's report is stale is compelling."

(infra, 44a to 46a)

The Court of Appeals concluded that "the district judge's construction of the affidavit was a careful and intelligent one - it was, however, not the only permissible one. The state judge's reading of the affidavit to establish probable cause is also defensible." (infra, 12a)

The crux of the Court of Appeals' reversal of the district judge's order was its conclusion that:

> "The application contains sufficient facts from which the state judge could find probable cause to believe that Tehfe and a number of his associates had been operating a well-organized drug smuggling and distribution ring for years. The affidavit clearly implicated Tehfe in a far-reaching operation. Pen registers, as well as surveillance reports, revealed significant contact between Tehfe and a number of individuals who were known drug dealers. More than mere association was established by the affidavit. It revealed the existence of an extensive criminal enterprise that relied on the telephone as an important means of communication. There was ample justification to find that crimes were being committed and that evidence could be developed through wiretaps.
>
> "Having established that Tehfe had a criminal scheme in being, the state did not then have to provide evidence that Sanchez was part of the organization. What was required was sufficient information so that the state judge could find probable cause to believe that the 22nd Street phone was being used in the Tehfe operation."
>
> (infra, 8a-9a)

The fact that the affidavit established that Tehfe was engaged in a conspiracy of some length was held to cure any question concerning the staleness of the information provided about the petitioner, the telephone at 517 22nd Street or the residence.

REASONS FOR GRANTING THE WRIT

1. In Illinois v. Gates, supra, at page 549, this Court cautioned reviewing courts that they must continue to conscientiously review the sufficiency of search warrant affidavits.

The Court of Appeals' decision in this case appears to take a contrary position in holding that a district court which carefully and intelligently reviews the sufficiency of an affidavit leading to a permissible construction of the affidavit invalidating the issuance of the warrant must nevertheless defer to the issuing magistrate's

determination. Petitioner submits that this Court did not intend in Illinois v. Gates, supra, to sanction such an illogical result.

It is logically impossible for a court to hold that a reviewing court made a permissible construction of a warrant affidavit in determining it to be insufficient and simultaneously to hold that the issuing magistrate's determination of probable cause was equally defensible. (infra,12a)

Petitioner believes the confusion inherent in the Court of Appeals decision results from its failure to consider the long established "due deference" requirement in conjunction with the long established duty of reviewing courts to conscientiously review the sufficiency of warrant affidavits.

2. The Court of Appeals' reasoning that once it was established that

Tehfe had a criminal scheme in being that the state then did not have to provide evidence that the petitioner Sanchez was part of that organization or that he was presently connected to the 22nd Street residence wherein the telephone was located represents a dangerous and expansive reading of this Court's decision in Zurcher v. Stanford Daily, supra.

The fact that Tehfe had a criminal scheme in being and had called someone at the targeted telephone did not provide probable cause to believe criminal acts were occurring during the telephone calls.

The information in the warrant was not that the 22nd Street address was being used by Tehfe but that it was being used by the petitioner Sanchez for illegal activity. The failure in the warrant to establish either that Sanchez was part of the Tehfe organization

or that he resided at or used the 22nd Street address left the warrant devoid of any information indicating that the phone calls made from the Tehfe phone to the 22nd Street phone were criminally related. No one other than the petitioner Sanchez was alleged to have used 22nd Street for illegal purposes and the failure to timely place him at the residence rendered the warrant illegal.

While Zurcher v. Stanford Daily, supra, stands for the proposition that there must be reasonable cause to believe that the specific things to be seized are present that principle has no application to the instant case absent a showing that Sanchez was presently using the residence - since he was the only one alleged to be committing illegal acts at that address, the specific things to be seized could only come through petitioner's illegal activity. His

illegal activity had to take place either from his participation in the conspiracy which concededly was not demonstrated, or through CI-3's information, which is undated.[3]

The Court of Appeals' decision now means that a warrant to wiretap a telephone may be obtained simply upon the basis that a criminal, e.g. Tehfe, is currently calling someone at the location of the telephone. Surely, Zurcher v. Stanford Daily, supra, did not intend such a result.

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4. The district court commented on the failure of the affidavit to link the petitioner to the targeted telephone. The district court stated:

> "[The affidavit] neither shows current suspicions or criminal behavior by Sanchez (or anyone else linked to the target premises), nor does it depict in any detail on going criminal activity by Sanchez or any other person shown to reside at or utilize the 517 22nd Street premises or telephone."
>
> (infra,54a-55a)

Zurcher v. Stanford Daily, supra, involved a question whether evidence of a crime could be seized from a newspaper not alleged to be a suspect in the crime being investigated. To extend the principle of Zurcher to the instant case is to open the door to the widespread wiretapping of all individuals or residenced which maintain communication with a suspected criminal absent the establishment that the telephone calls between the criminal and the residence are of a criminal nature.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: January 25, 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5596

UNITED STATES OF AMERICA,

Appellant

v.

JOHN TEHFE, a/k/a Ali Tehfe;
SAMIR TEHFE; ALI BAZZI;
ISSA BASSAM; NABIL NEHMI;
ADOLFO SANCHEZ, a/k/a "Fifu";
ANDRES GUECHE; BENNY RODRIGUEZ;
LUIS HERRERA; SAMIRA TEHFE;
JOSE LUIS PEREZ, a/k/a "Junior";
LUZ RODRIGUEZ-PEREZ; ROBERTO MARTINEZ,
a/k/a "Papito",

Appellees

APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE DISTRICT OF NEW JERSEY

(D.C. Crim. No. 83-37)

Argued November 1, 1983

Before: ALDISERT, HUNTER and WEIS, *Circuit Judges*.

Opinion filed December 6, 1983

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OPINION OF THE COURT

WEIS, Circuit Judge.

This is an appeal by the United States from an order suppressing evidence secured from a wiretap. The district court found that at the time the application for a wiretap was filed there was insufficient current information on a defendant's criminal activity on which to authorize the tap. We conclude, however, that the state judge who approved the wiretap properly found probable cause to believe that the telephone in question was being used in a continuing criminal enterprise. Accordingly, the suppression order will be vacated and the case remanded.

Defendants Sanchez and Herrera were indicted for conspiracy and various violations of the federal narcotics laws. The district court granted their motion to suppress because information in the warrant

affidavit about Sanchez was stale. No discussion as to Herrera's connection with Sanchez on the target telephone appears in the application for the wiretap or in the district court opinion. However, the Government represents that the issues raised here will have a substantial effect in its case against Herrera.

During 1982, federal and state authorities in New Jersey cooperated in the investigation of a large scale drug distribution ring that included John Tehfe as one of its principals. According to confidential informants, Tehfe smuggled heroin and cocaine through Miami, had a distribution network in Dearborn, Michigan, and made frequent trips to South America in connection with his cocaine business. Based on this information, federal agents secured a wiretap order from a federal district judge to conduct electronic surveillance on Tehfe's telephone in Guttenberg, New Jersey.

The wiretap authorization under review in this appeal was sought by state officers on January 21, 1983. They applied to a judge of the Superior Court of New Jersey for permission to tap the phone registered to "R. Sanchez" at 22nd Street, Union City, New Jersey. The lengthy affidavit attached to the application for the warrant described Tehfe's and his associates' large scale drug smuggling and distribution operation in the period beginning in 1978 and allegedly still continuing. These activities were international in scope and included contacts with sources in Lebanon and Colombia.

According to the affidavit presented to the state court, an automobile registered to a known drug distributor was seen in the driveway of Tehfe's Guttenberg home in October 1982. On January 10 and 13 of 1983, only a few days before the application for the state wiretap was filed, another drug distributor's car was seen parked at Tehfe's residence. Pen register records also revealed that calls, including one on

January 10, 1983, were made from a telephone at his home to other drug dealers in the months before the request for a wiretap was granted.

Tehfe, who also had a residence in Flushing, New York, had an interest in a New Jersey business known as Betty Fashions. He had given one confidential informant the telephone number of Betty Fashions to use if he wished to contact Tehfe about his drug business. Law-enforcement agents raided Betty Fashions in May 1982 and seized automatic weapons, over $14,000 in cash, and a quantity of marijuana. Moreover, an individual arrested for involvement in a heroin distribution conspiracy listed his occupation as a salesman for Betty Fashions.

The application sought permission to tap the 22nd Street telephone in the belief that it was being used by the conspirators in "an extensive narcotics distribution enterprise of international dimension." A confidential informant was quoted as having personal knowledge that Adolfo Sanchez and Andres Gueche were distributing heroin from residences located at 22nd Street and 48th Street in Union City.[1] They told the informant that their source of supply was "somewhere in the Mid-West."

Telephone company records disclosed that the phone at 22nd Street was registered in the name of "R. Sanchez," and the phone on 48th Street was registered to "A. Sanchez." Each subscriber listed the other as a reference. Criminal records disclosed that Adolpho Sanchez had been arrested and convicted for narcotics offenses.[2]

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1. Permission was also given to wiretap the telephone at the residence on 48th Street. However, state officials never followed through on that order.

2. In the district court, Sanchez contended that the affidavit's mischaracterization of his criminal record required suppression of the evidence. The court agreed that the "affidavit badly

An analysis of data supplied by pen registers revealed telephone communications between 22nd Street and Betty Fashions. In addition, calls were placed from both locations to telephones of two "documented drug violators." Another common number, called from both 22nd Street and Tehfe's residence, was that of a cafe in New York City frequented by known drug traffickers. The study of common phone numbers did not disclose when the various calls were made. The most recent events recited about the phone at 22nd Street consisted of calls placed to it from Tehfe's New York residence on January 16, 1983 and from Tehfe's New Jersey residence on January 17 and 19, 1983.

The affidavit also disclosed that Adolpho Sanchez was seen entering Tehfe's residence on one occasion. In December 1982, a month before the filing of the application, a major narcotics violator was seen entering the 22nd Street location.

In ruling on the suppression motions, the district judge found that the application for the tap on Tehfe's phone had satisfied the requirements of probable cause and had recited "facts sufficiently indicating relevant, protracted and continuous activity on Tehfe's part so as to cure or eliminate the arguable staleness of certain information in the affidavit." Tehfe's motion to suppress the evidence obtained from his telephone was denied, and he later entered a guilty plea.

Even though the state application contained much of the same information about the enterprise that was in the federal application for the Tehfe wiretap, the district court reached a different conclusion on the

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mischaracterized Sanchez's record," but concluded that suppression was not warranted. "Mischaracterizing the extent of his record and his conviction does not change the fact that Sanchez had been arrested and convicted for narcotics offenses." Appellees have not contested this aspect of the district court's opinion.

suppression motion with respect to the tap at 22nd Street. The district judge noted that the report by the confidential informant that Sanchez was distributing heroin from that address did not state when the events actually occurred. As the court read the affidavit, it "[a]t . . . best . . . establishes that, in or before October 1982, [the informant] *supplied information* concerning conversations with Sanchez." (Emphasis in the original.) Similarly, Sanchez's visit to the Tehfe residence was thought to be in October 1982.

The more recent visit of the drug trafficker in December 1982 to 22nd Street was considered to have little probative value because the affidavit did not establish that Sanchez lived there. In the same vein, the failure to provide information linking Sanchez to Tehfe and Betty Fashions diminished the significance of the associational factor suggested by the undated phone records. The district judge viewed the three calls from the Tehfe residences during the week preceding the wiretap application as indicating mere association, not probable cause.

The court acknowledged that the "affidavit does recite drug-related activities of other individuals that arguably appear 'continuous and protracted.' But it does not give any detail or facts showing Sanchez to be a part of these ongoing activities. . . ." In conclusion, the court stated, "The affidavit does not sufficiently link Sanchez to the target premises and communication facility to satisfy the particular nuances of probable cause . . . . But even assuming the adequacy of the affidavit on that score, the court holds that the information . . . was fatally stale."

After argument on the government's motion for reconsideration, the district court declined to reverse its suppression order. On appeal, the government argues essentially that the district court erred in focusing on Sanchez's possible culpability rather than on the

probability that the telephone at the 22nd Street address was being used for criminal purposes.

In its most recent pronouncement on the interpretation of affidavits for search warrants, the Supreme Court cautioned that

> "after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'
>
> • • • •
>
> [S]o long as a magistrate had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more."

Illinois v. Gates, 51 U.S.L.W. 4709, 4715 (June 8, 1983) (citations omitted). This does not mean that reviewing courts should simply rubber stamp a magistrate's conclusions; it does require the application of a common sense standard. *United States v. Ventresca*, 380 U.S. 102, 108, 109 (1965); *see also Gates*, 51 U.S.L.W. at 4715, 4716.

When reviewing an application, courts must also bear in mind that search warrants are directed, not at persons, but at property where there is probable cause to believe that instrumentalities or evidence of crime will be found. *Zurcher v. Stanford Daily*, 436 U.S. 547, 553-560 (1978). The affidavit in support of a warrant need not present information that would justify the arrest of the individual in possession of or in control of the property. Nor is it required that the owner be suspected of having committed a crime. Property owned by a person absolutely innocent of any wrongdoing may nevertheless be searched under a valid warrant. *See Id.*

These fourth amendment principles are the same in

an authorization for a wiretap as in a property search. That the subscriber of the telephone service be suspected of unlawful activity is not a prerequisite to a wiretap authorization. As expressed in the statutory language, what is necessary is probable cause to believe that "an individual . . . has committed or is about to commit a particular offense" and that "communications concerning that offense" may be intercepted from a designated facility. 18 U.S.C. § 2518(3) (1982); *see also* N.J. REV. STAT. 2A:156-10 (Supp. 1983-84)[3]

There are additional statutory restrictions, such as intercept minimization of "innocent" conversations, specific limitations on the duration of the tap, and demonstration by the applicant that other means of securing the evidence are not available or practicable. 18 U.S.C. § 2518(3),(5) (1982); N.J. REV. STAT. 2A:156A-10(c), 2A:156A-12 (Supp. 1983-84). These latter considerations are not at issue on this appeal, however.

The application contains sufficient facts from which the state judge could find probable cause to believe that Tehfe and a number of his associates had been operating a well-organized drug smuggling and distribution ring for some years. The affidavit clearly implicated Tehfe in a far-reaching operation. Pen

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3. According to the district court, "[u]nder the New Jersey wiretap statute . . .. a warrant application must satisfy the traditional requirements of probable cause, codified in the state and the almost identical federal statute." The parties do not disagree with this assessment of the statutory provisions and rely exclusively on federal case law to support their positions. We cannot quarrel with the approach taken by the district court or the parties, and discern no difference in the federal or state statute that implicates the issues raised on appeal. *See* United States v. Vazquez 604 F.2d 1269, 1280 n.26 (2d Cir.), *cert. denied*, 444 U.S. 981, 1019 (1979); *see also* State v. Sanchez, 149 N.J. Super. 381, 394-97, 373 A.2d 1028, 1034-36 (Law Div. 1977) (suggesting differences between federal and New Jersey wiretap statute in other areas).

registers, as well as surveillance reports, revealed significant contact between Tehfe and a number of individuals who were known drug dealers. More than mere association was established by the affidavit. It revealed the existence of an extensive criminal enterprise that relied on the telephone as an important means of communication. There was ample justification to find that crimes were being committed and that evidence could be developed through wiretaps.

Having established that Tehfe had a criminal scheme in being, the state did not then have to provide evidence that Sanchez was part of the organization. What was required was sufficient information so that the state judge could find probable cause to believe that the 22nd Street phone was being used in the Tehfe operation.

An analogous issue was presented in *United States v. Hyde*, 574 F.2d 856, 862 (5th Cir. 1978), where some defendants contended that their connection with the conspiracy was insufficiently set forth in the application for a wiretap. The court rejected the argument stating, "[W]e have never required that a defendant be named in a wiretap application or accused of using the suspected telephone before evidence obtained by the wiretap can be used against him. One of the objects of wiretapping is to ascertain the full extent of participation in criminal activity, and we need not limit retrospectively the pool of potential defendants." *See also United States v. Martin*, 599 F.2d 880, 884-85 (9th Cir.), *cert. denied*, 441 U.S. 962 (1979) (rebuffing contention that wiretap statute requires probable cause of criminal activity for each person named in application).

In determining whether a link existed between the target phone and the Tehfe operation, Sanchez's drug-related activities would be relevant as would those of other visitors to the 22nd Street location. The affidavit discloses that at some time Sanchez

distributed heroin from that address, and that a convicted drug trafficker came to that location on December 10, 1982. In January 1983 this individual had been observed driving another person to Betty Fashions and then dropping him off at 48th Street.[4]

Included in the affidavit was an analysis of phone calls between 22nd Street and other locations associated with the Tehfe operation. The time period covered by that study was not supplied; nevertheless, the phone history does furnish additional evidence of a connection between 22nd Street and the criminal enterprise at some time during its operation.

Taking a common sense approach to evaluating these facts, *see Gates*, 51 U.S.L.W. at 4716, the state judge could conclude that the 22nd Street phone was being used to further the aims of the Tehfe organization. The district judge's hesitancy to accept that view stems from his concern that much of the pertinent evidence was stale, and therefore should not be considered.

The concept of staleness is important in determining probable cause for a search but is not generally applicable to the showing required to issue an arrest warrant. In the arrest situation, the magistrate must find probable cause to believe that a crime has been committed and the person to be arrested is the culpable party. In that instance, the issuing officer is concerned with historical facts and probable cause will exist for an indefinite time. Passage of time will not usually alter the significance of the underlying facts.

An application for a search warrant differs in that it

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4. The affidavit states that this event occurred in 1982. In the context of the order of events described in the affidavit, we believe that the 1982 date was a typographical error and that the event probably occurred in 1983. In any event, if the 1982 date is in fact the correct one, that circumstance would not affect our disposition of this case.

is necessary to establish that certain items are probably located at the present time in a certain place. It is not enough that the items may have been at the specified location at some time in the past -- there must be probable cause to believe that they are there when the warrant issues. *See generally* 1 W. LAFAVE, SEARCH AND SEIZURE § 3.7(a) (1978).

The likelihood that the evidence sought is still in place depends on a number of variables, such as the nature of the crime, of the criminal, of the thing to be seized, and of the place to be searched. *See Id.* In *United States v. Harris*, 482 F.2d 1115, 1119 (3d Cir. 1973), the defendant, who was allegedly trafficking in drugs, contended that information in an application for a search warrant was stale. In rejecting that argument, we quoted approvingly from *United States v. Johnson*, 461 F.2d 285, 287 (10th Cir. 1972), that when an activity is of a protracted and continuous nature "the passage of time becomes less significant." *See also United States v. Forsythe*, 560 F.2d 1127, 1132 (3d Cir. 1977). We further observed that "protracted and continuous activity is inherent in a large scale narcotics operation."

The factors affecting staleness are more easily applied in cases of tangible property, rather than wiretaps. However, the rationale is still valid.

In *United States v. Hyde*, staleness was raised as a reason for suppression of wiretap evidence. There, the affidavit alleged a conspiracy that had continued for two years, contained information about events "less than 2 months old as well as the most recent telephone records available." 574 F.2d at 865. In finding the information in the affidavit was not stale, the court concluded that the state justice properly inferred that telephone communications that had been occurring for two years "had not mysteriously stopped within the past month." *Id.* The court also stated that the liberal examination given staleness in a protracted criminal conduct case "is

even more defensible in wiretap cases than in ordinary warrant cases, since no tangible objects which can be quickly carried off are sought." *Id.*; *see also United States v. Martino*, 664 F.2d 860, 866-67 (2d Cir. 1981), *cert. denied*, 458 U.S. 1110 (1982); *United States v. Webster*, 639 F.2d 174, 178-79 (4th Cir.), *cert. denied*, 454 U.S. 857 (1981), *modified on other grounds*, 669 F.2d 185 (4th Cir.), *cert. denied*, 456 U.S. 935 (1982); *United States v. Weinrich*, 586 F.2d 481, 491 (5th Cir. 1978).

In this case, ample information in the affidavit shows that the Tehfe operation was one of several years standing. The staleness issue, therefore, should be construed liberally. The district judge, however, limited the inquiry to an "enterprise involving Sanchez and his targeted telephone." Viewing the circumstances from that vantage point, he found no "current suspicious or criminal behavior by Sanchez (or anyone else linked to the target premises)."

But there was recent information that would permit a finding that the Tehfe enterprise was connected with the 22nd Street phone. Indeed, in the week just before the application was presented, the pen register recorded calls from Tehfe to the targeted phone. Moreover, once the state judge was presented with sufficient facts to find that the Tehfe enterprise was a prolonged one that included a series of contacts with 22nd Street, the informant's allegations of drug dealing by Sanchez were no longer stale. They lent themselves to a reasonable belief that while the enterprise was continuing so was Sanchez's connection with it.

The district judge's construction of the affidavit was a careful and intelligent one -- it was, however, not the only permissible one. The state judge's reading of the affidavit to establish probable cause is also defensible, and the determination of probable cause was entrusted to him in the first instance. We cannot say he erred in

viewing the affidavit as establishing probable cause that the 22nd Street phone played a part in a long-standing criminal enterprise.

In summary, we conclude that the state judge did not err in finding probable cause to issue the wiretap authorization. Accordingly, the order of the district court directing suppression of the evidence secured as a result of that wiretap will be vacated and the case remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, Plaintiff,	:	Criminal Action
v.	:	No. 83-37
JOHN TEHFE, et al, Defendants	:	OPINION

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GERRY, District Judge

In connection with the law enforcement investigation that produced the instant indictment, federal and state judicial officers authorized telephone wiretaps on several telephones:

1. Telephone number: (201) 868-1375

   Subscriber: John Ali Tehfe

   Address: 6908 Polk St.
   Guttenberg, NJ

   (hereinafter, the "Tehfe" wiretap)

2. Telephone Number: (201) 867-3521[1]

   Subscriber: A. Sanchez

   Address: 151 48th St.
   Union City, NJ

   Telephone Number: (201) 865-8677

   Subscriber: R. Sanchez

   Address: 517 22nd St.
   Union City, NJ

   (the "Sanchez" wiretaps).

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[1]The Government never wiretapped this telephone at 151 48th Street.

3. Telephone Number: (201) 864-5636

Subscriber: Juan Perez[2]

Address: 4911 Bergenline Ave.
West New York, NJ

A number of the defendants have attacked the warrants that permitted the wiretaps on the Tehfe and Sanchez telephones as not supported by a showing of probable cause. Defendants also contend that the applications for the Tehfe and Sanchez wiretaps failed to demonstrate the requisite necessity for resort to telephone eavesdropping. Finally, one or more defendants assert that the investigating authorities failed appropriately to minimize the interception of non-pertinent, innocent conversations over the target telephones.

Lastly, defendant Sanchez asserts that the affidavit supporting the state's application for an order allowing a wiretap on his

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[2]Juan Perez, as distinguished from Jose Luis Perez, is not a defendant in the instant case.

telephone contained a knowing and deliberate lie about Sanchez's criminal record or, at minimum, a misrepresentation of defendant's record that evinced a reckless disregard for the truth.

Section 2518 of Title 18, United States Code, delineates requirements for approval of interception of wire or oral communications. Section 2518(3) incorporates or codifies the traditional, constitutional requirement that the Government demonstrate to a judicial officer, "probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense..." 18 U.S.C. §2518(3)(a). The statute establishes two other criteria that logically attend the context of wire communications:

1. that "there is probable cause for belief that particular communications concerning that offense will be obtained through such interception ... "

2. that "there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are

> to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person."

18 U.S.C. § 2518(3)(b)(c)

The statute provides two additional safeguards for privacy interests so patently involved in electronic interception. First, the application must show that normal investigative procedures have failed or entail too much danger to merit attempt; second, the monitoring authorities must attempt, in accordance with an appropriate judicial order, to minimize the interception of non-pertinent conversations.

I. The "Tehfe" Wiretap - Probable Cause and Necessity.

A. Probable Cause Regarding Telephone Number (201) 868-1375 Subscriber: John Tehfe, 6908 Polk St. Guttenberg, N.J.

Several defendants, including John Tehfe and Samir Tehfe, challenge the sufficiency of the affidavit by which the Government sought to establish probable cause for the institution

of a telephone tap on John Tehfe's telephone. According to defendant, the affidavit's purported showing of probable cause rests upon information supplied by three unidentified informants. Defendants urge that for each informant the affidavit fails to establish a foundation in the informant's personal knowledge for the information he supplied; defendants also urge that the supporting affidavit fails to set forth for the informants the requisite indicia of reliability.

Specifically, as to Confidential Informant #1 (CI #1), defendants urge that the affidavit (by Special Agent John Nolan) failed to establish CI #1's reliability or credibility. According to defendant Samir Tehfe, the affidavit purportedly "verifies" CI #1's information by noting that: (1) CI #1 arranged a controlled buy of drugs with a person named Beudoun sometime in October 1982; (2) someone at the John Tehfe residence telephones the Beudoun residence 11 times from July 13 to

August 16, 1982; (3) someone at the Tehfe residence telephoned persons suspected by the police of criminal conduct; and (4) people suspected of criminal conduct, including Beudoun, had their cars parked in front of the Tehfe residence. Defendants argue that this "corroboration" verifies nothing but innocent conduct and is therefore defective.

Defendants rely on the general rule of Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. U.S., 393 U.S. 410 (1969) that affidavits for search warrants based on the reports of an unidentified informant must set forth some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable. But the Government points to another line of cases that specifically involve the reliability of previously untested informants in the context of wiretap affidavits. See U.S. v. Weinrich, 586 F.2d 481 (5th Cir.1978) and U.S. v. Hyde, 574 F.2d 856 (5th Cir.1978).

Those cases set forth the following factors for evaluating an unidentified informant's report: the detail in which the informant information was presented, Hyde, 574 F.2d at 863; Weinrich, 586 F.2d at 490; the fact that some of the informant statements constituted declarations against penal interest under Fed. R. Evid. 804 (b)(3), Hyde, 574 F.2d at 863; the fact that crucial incriminating facts contained in the affidavit were cross-verified by other independent confidential sources, Weinrich, 586 F.2d at 490; Hyde, 574 F.2d at 863; and that to the fullest extent possible, details of the informants' stories were verified by independent law enforcement investigation, Weinrich, 586 F.2d at 490.

As a threshhold matter, the Government argues that when an untested informant actually witnesses or participates in the crime, his reliability need not be shown. See U.S. v. Miley, 513 F.2d 1191 (2d Cir.), cert. denied, 423 U.S. 842 (1975) (in probable cause for

arrest situation).

We think the affidavit, taken as a whole, see U.S. v. Edwards, 577 F.2d 883, 895 (5th Cir. 1978) (en banc), quoting Smith v. U.S., 358 F.2d 833, 837 (5th Cir. 1966), cert.denied, 386 U.S. 1008 (1967), demonstrates the reliability of the informants to a satisfactory degree.

First, Agent Nolan affirmed that (1) an individual named Beudoun, with a history of drug trafficking, told CI #1 in John Tehfe's presence that Beudoun and Tehfe worked together in the cocaine and heroin trade; and (2) Tehfe stated, in CI #1's presence, that he - Thefe - smuggled heroin and cocaine through Miami and had a distribution network in Dearborn, Michigan. The affidavit stated that CI #1's statements regarding Beudoun's heroin involvement (not involvement with Tehfe per se) were corroborated by an independent Drug Enforcement Administration (DEA) investigation, including an aborted

DEA-arranged controlled purchase from Beudoun by a DEA agent in October 1982.

The statement in the affidavit that CI #1 had given reliable and accurate information regarding previous narcotics' transactions involving Beudoun equals or exceeds the recitation commonly held sufficient to prove an informant's reliability: that the informant has in the past given accurate information leading to convictions. See U.S. v. Sultan, 463 F.2d 1066 (2d Cir. 1972).

Likewise, the affidavit clearly states that CI #1's knowledge of defendant John Tehfe's activities arose from CI #1's personal conversations with John Tehfe, or admissions made by Tehfe in the informant's presence. The affirmation that CI #3 learned directly from Tehfe himself of Tehfe's dealings sufficiently sets forth the underlying basis of CI #1's knowledge to allow a magistrate to determine trustworthiness of the report. See Id. at 1068.

Moreover, the affidavit provided a great

deal of highly circumstantial evidence which, standing alone, would not amount to probable cause -- but in combination with the confidential source reports, does help to meet the standard. For example, CI #2, according to the affidavit, had heard Tehfe say that he made frequent trips to South America in connection with his cocaine business. The affidavit also recites that United States Customs records show Tehfe making numerous trips to Columbia between 1978 and 1982, and that on a number of occasions he re-entered the country with large sums of money.

In another somewhat complicated but telling dimension of the affidavit, the affidavit recounts in minute detail the course of a narcotics purchase-negotiation and bust involving "Betty Fashions," a clothing outlet whose telephone number Tehfe gave to CI #1 as a number to call if CI #1 wanted to contact Tehfe in relation to Tehfe's "drug business."

In brief, one G. Plasencia sold drugs to

Undercover Agent Veronica Baker on several occasions. On May 26, 1982, Plasencia told Baker he would have to contact his source in order to obtain heroin for Baker. Agents observed Plasencia meeting Perez, and then Perez proceeding to Betty Fashions; Perez drove to Betty Fashions in a car registered to (John) Ali Tehfe; when Perez left and returned to his own residence, agents observed him carrying a paper bag. Nolan Affidavit ¶¶ 30-32.

Overlaid against these significant portions of the affidavit were the recitation of phone calls made to and from the Tehfe residence -- among others:

(a) 11 calls from Tehfe to Beudoun between July 13, 1982 to August 16, 1982;

(b) numerous telephone calls from Tehfe to Betty Fashions, Inc., in January, 1983.

The record of calls, standing alone, merely shows association, but no criminal activity; nonetheless, in light of the other

affirmations in the affidavit, the record of calls add to the scale in favor of probable cause.

One might argue that some of the most probative parts of the Nolan affidavit concern information about Tehfe's narcotic's activities many months before the submission of the application for the warrant. But when an affidavit recites facts indicating activity of "a protracted and continuous nature," the passage of time between the occurrence of events essential to a finding of probable cause, on one hand, and the date of the warrant, on the other, diminishes in importance. See U.S. v. Harris, 482 F.2d 1115, 1119 (3d Cir. 1973). The court finds that the Nolan affidavit recites facts sufficiently indicating relevant protracted and continuous activity on Tehfe's part so as to cure or eliminate the arguable staleness of certain information in the affidavit.

In short, the court finds that the Nolan

affidavit satisfied the requirements of probable cause.[3] The affidavit depicted

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[3]Counsel for John Tehfe makes two additional arguments in attacking the affidavit. First, John Tehfe argues that Nolan in bad faith misrepresented to Judge Biunno that John Tehfe resided at 6908 Polk Street, the address at which the phone was tapped, when Nolan knew that John Tehfe in fact resided in Queens. It is difficult to accept defendant's protestations of bad faith or cries of foul when the telephone at the Polk Street residence was listed, according to the affidavit, in John Tehfe's name. To say he did not reside at Polk Street and that the agents knew it was not his residence makes little or no sense when John Tehfe was the telephone subscriber for the phone that was tapped. Second, the defendant urges that Nolan misrepresented that Tehfe lived in New Jersey and associated with known narcotics' violators. A number of Tehfe's contacts as described in the Nolan affidavit had criminal records for narcotics' violations -- and hence were indeed known violators. Whether John Tehfe lived in New Jersey seems immaterial; and in any event, it seems quite plausible that a man of his alleged wealth would have and maintain or use two residences. Defendant's arguments addressed to alleged misrepresentations in the Nolan affidavit are without merit. Under the standards enunciated in Franks v. Delaware, 438 U.S. 154 (1978), they do not constitute misrepresentations material to a showing of probable cause.

admissions by Tehfe to CI #1 of extensive illegal narcotics' dealing. The affidavit corroborated such reported admissions and, through analysis of telephone records and surveillance, linked the admissions to the Polk Street, Guttenberg, New Jersey, residence.

B. Necessity

Defendants also challenge the Nolan affidavit for an alleged failure to show that the wiretaps were a necessary recourse.

Section 2518(3)(c) of Title 18, United States Code, provides that the judge deciding an electronic surveillance application must make a finding that normal investigative procedures have been tried and reasonably appear unlikely to succeed. To comply with the statutorily-required demonstration of necessity, the affidavit must contain a factual predicate to support the finding. U.S. v. Armocida, 515 F.2d 38 (3d Cir. 1975).

The issuing judge made such a finding, and the affidavit evinces a factual predicate

for that finding: affiant Nolan affirmed that none of his reporting confidential sources were in a position to make a purchase from Tehfe. ¶ 59, Nolan Affidavit. Nolan also described in some detail how efforts at surveillance had proven ineffective. The location of Tehfe's residence on a seldom traveled street, for example, had rendered discreet surveillance impossible.

Moreover, a number of investigative techniques had been employed and exploited to a considerable degree, but had evinced shortcomings. For example, pen registers and physical surveillance revealed relationships between suspected conspirators but did not yield the content or nature of those relationships.

The affidavit's clear recitation of the methods employed by the investigating authorities prior to the application, and the shortcomings of those methods, constitutes, in this court's view, an adequate showing of

necessity.

II. The "Sanchez" Wiretap.

On January 22, 1983, officials of the Hudson County Prosecutor's Office applied to Judge Arthur Simpson, A.J.S.C., for a warrant to permit the electronic interception of telephone conversations on telephone number (201) 865-8677, located at 517 22nd Street, Union City, New Jersey. Investigator Pamela Resch of the Hudson County Prosecutor's Office supplied the affidavit in support of the state's application for a warrant.

Defendant Sanchez, joined by other defendants, moves to suppress evidence gathered by the 517 22nd Street wiretap. He asserts that the supporting affidavit by Ms. Resch did not establish probable cause as required constitutionally and under the New Jersey wiretap statute, N.J.S.A. 2A:156A-1, et seq.

The "Resch affidavit" contains 67

paragraphs and spans 29 double-spaced typewritten pages. The first 37 paragraphs describe allegedly criminal, narcotics-related activities of John Tehfe, Jihad Beudoun, Gilberto Plasencia, Juan Perez, Benny Rodriguez and several other individuals. That first portion of the affidavit makes no mention of Adolfo Sanchez.

Paragraphs 39 and 40 contain the only facially incriminating information concerning defendant Sanchez. That information comes from the report of a confidential source, named in the affidavit as "CI #3." Those paragraphs state the following:

> 39. CI-3 stated to members of this Office that he had personal knowledge of individuals who were distributing heroin from 151-48th Street, Union City, New Jersey and 517-22nd Street, Union City, New Jersey. These individuals were known to CI-3 only as "Fifu" and "Andres." CI-3 was told by these people that he could contact them at telephone number (201) 867-3521.

> 40. CI-3 has acquired this information as a result of personal contact and association with these individuals. CI-3 has had conversations with "Fifu" and "Andres" concerning the purchase of heroin from them. During the course of these negotiations, CI-3 was told that the heroin supply for these individuals was somewhere in the Mid-West. CI-3 also knows other individuals who have conducted drug transactions with these two men.

Subsequent statements in the affidavit satisfactorily identify "Fifu" as Adolfo Sanchez. See Resch Affidavit ¶ 42. The affidavit, however, provides no information as to the date or dates upon which CI-3 conversed with Sanchez about the purchase of heroin from Sanchez and "Andre." Similarly, the affidavit is silent as to when CI-3 gained his "personal knowledge" that Sanchez was distributing heroin from the premises at 517-22nd Street. The affidavit does state that CI-3 made his report "prior to the full blossoming of the present investigation." The affidavit, however, presents no clear, unambiguous indication of when the investigation fully blossomed.

Paragraph 8 of the affidavit suggests that the present investigation commenced in October 1982. Many of the activities described in the affidavit, including investigative acts by various state or federal officials, transpired in the months before October 1982. In light of the entire affidavit, one cannot reasonably conclude that the "blossoming" of the investigation occurred after October, 1982. If there is any inference available, it is that the "full blossoming" of the investigation, prior to which CI-3 made his report, occurred in or before October 1982. Thus the affidavit ultimately informs us that CI-3 made his report on Sanchez in or before October 1982. Perhaps more important, this somewhat tortured analysis does not indicate when the events related by CI-3 actually occurred. At its best, then, the affidavit does not establish when the incriminating conversation or conversations

with Sanchez took place.

The affidavit presents certain other information concerning, or possibly concerning, Sanchez or the premises at 517 22nd Street, Union City. None of that information is by itself incriminating; rather, it suggests associational ties between Sanchez, or the premises at 517 22nd Street, and other individuals who are, according to the affidavit, active in the narcotics market.

First, the affidavit recites that surveillance agents observed Sanchez entering John Tehfe's house on an unspecified date. Once again, as with CI-3's information, other portions of the affidavit suggest that the agents made the observation no later than October 1982. That is, the affidavit places Sanchez at the Tehfe residence at a time "following the interview with Samira Tehfe concerning the death of Havi Dbouk." The affidavit

does not provide a precise date upon which the Samira Tehfe interview transpired. However, the wording of paragraph 8 again usggests that the interview occurred in or about October 1982. Thus, Sanchez was seen entering Tehfe's house at some unspecified and indeterminate time in or after October 1982.

Second, the affidavit indicates that on December 10, 1982, one Libio Carcasses, a convicted narcotics' violator, parked a vehicle outside the premises at 517 22nd Street and entered the house.

However, the affidavit nowhere establishes that Sanchez lived at 517 22nd Street so the probative value of Carcasses' presence there is diminished. Only the cryptically described report of CI-3 places Sanchez at that address.[4] The informant,

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[4]The affidavit elsewhere states that the telephone number 201-865-8677 is registered to a R. Sanchez at 517 22nd

according to the affidavit's paragraph 39, had "personal knowledge" that Sanchez was distributing heroin from those premises. But the affidavit does not explain the source of CI-3's personal knowledge, except arguable for mention of the conversations on an unspecified date with Sanchez "concerning the purchase of heroin" from Sanchez and Andre. As noted above, not only are those conversations undated, but, as the affidavit recounts it, the conversations do not include information placing Sanchez at 517 22nd Street.

One can argue, as the Government must

Street, Union City, New Jersey, and that telephone number 201-867-3521 is registered to A. Sanchez at 151 48th Street, Union City, New Jersey. The only connection of A. Sanchez, as opposed to Adolfo Sanchez, shown in the affidavit to 517 22nd Street, Union City, New Jersey, is that R. Sanchez used A. Sanchez as a reference with the phone company. The affidavit never established Adolfo Sanchez to be the "A. Sanchez" residing at 151 48th Street.

that conversation with Sanchez was the source of the informant's "personal knowledge" that Sanchez was distributing drugs from 517 22nd Street. But that is at best a plausible inference, belied by the affidavit itself. Had that been the case, one reasonable would think that, with such crucial, site-related intelligence, the affiant would clearly have stated it. Moreover, the paragraphs in question also provide a suggestion that some of CI-3's information came through unidentified contacts in the community: "CI-3 also knows other individuals who have conducted drug transactions with ... (Sanchez and Andre)." Resch Affidavit, ¶ 40. The reader must speculate whether such hearsay, -- which could be the casual rumor that does not establish probable cause, see U.S. v. Karanthanos, 531 F.2d 26, 31, (2d Cir. 1976), cert.denied, 428 U.S. 910, -- was the source of the information

placing Sanchez's drug dealings at the subject address.

Thus, the information of December 10, 1982, placing Carcasses at 517 22nd Street, says very little about Sanchez; at best, by a generous reading of the affidavit, it shows that Carcasses visited a building from which Sanchez was said to have dealt in narcotics at some unspecified time.

The affidavit also describes the results of an analysis of records of telephone calls: (1) between the 517 22nd Street premises and Betty Fashions; (2) to common numbers belonging to convicted narcotics' violators from the Betty Fashions telephone and the telephone at 517 22nd Street; and (3) to a common number in New York City, Victor's Cafe, an alleged hangout for known narcotics' violators, from the telephones at 517 22nd Street, Betty Fashions and John Tehfe's home.

The affidavit does not date those calls.

The records do suggest some associational ties between John Tehfe, the business Betty Fashions, and someone who used the telephone at 517 22nd Street. But without specific dates, even the relevance of associational information is diminished. Also, without information linking the calls from 517 22nd Street to a particular individual (Sanchez), their significance in an assessment of probable cause declines.

Finally, the affidavit recounts telephone records that show 3 telephone calls between John Tehfe's residence and 517 22nd Street in the week prior to the wiretap warrant application. Those calls suggest some association between the two households, but, like all evidence of mere association, they do not establish probable cause. See U.S. v. Jackson, 549 F.2d 517, 536 (8th Cir. 1977), cert. denied, 97 S.Ct. 1682 (1977); U.S. v. Johnson, 539 F.2d 181,

192 n.40 (D.C. Cir. 1976).

In sum, the affidavit presents one confidential informant's report concerning an admission of culpability by Sanchez, but that report and the admission itself are undated. A reasonable reading of the affidavit makes that report by the informant in the vicinity of 100 days old by the time the state applied for a warrant.

The affidavit also presents some evidence showing or suggesting some association between Sanchez and known or suspected drug violators. Some of the evidence is undated. One surveillance observation (of Libio Carcasses) was 42 days old; certain telephone calls occurred immediately before the wiretap application.

Defendant argues that the affidavit does not show probable cause. Alternately, defendant asserts that the information from which probable cause arises was stale and therefore inadequate to justify the

warrant's issuance.

When the information provided by a confidential informant supplies the foundation for a finding of probable cause, the affidavit setting forth that information must satisfy two criteria. First, the affidavit must show the underlying circumstances from which the informant's conclusions or "tip" arises. Second, the affiant must set forth a basis for his belief that the informant is credible and his information reliable. See U.S. v. Spinelli, supra.

The Resch affidavit asserts that CI-3 had in the past provided information which led to arrests and convictions for violations of Title 24 of the New Jersey Statutes (treating with controlled dangerous substances) and seizures of large amounts of such contraband. Affidavit of Resch ¶ 38. That affirmation suffices to establish the credibility of the informant

and the reliability of his information. U.S. v. Sultan, 463 F.2d 1066 (2d Cir. 1972).

In her affidavit, Resch affirms that CI-3 reported that Sanchez had personally conversed with CI-3 concerning the purchase of heroin from him, Sanchez. That is, CI-3 reported the defendant Sanchez's admission in CI-3's presence, that Sanchez sold heroin.

Defendant argues that the affidavit fails to set forth the "underlying circumstances" upon which CI-3's conclusions are based.

But defendant ignores the obvious significance of the affidavit's recitation that the informant learned of Sanchez's criminal activities by Sanchez's own admission. At least one court has held that "the requirement ... that the basis of the informant's belief be shown, is met ... by the informant's statement that his information was based upon defendant's own ad-

mission. " U.S. v. Sultan, 463 F.2d at 1068.

In a technical sense, then, CI-3's report arguably satisfies the two-pronged test by which courts assess the significance of an unidentified informant's report. We can only observe, however, that it is a very thin showing of probable cause. Unlike many confidential informant reports upon which magistrates find probable cause CI-3's report recites almost no detail about Sanchez's criminal activities or operation, nor does it relate eye-witness accounts of the target's involvement in drug transactions. See, e.g., U.S. v. Weinrich, 586 F.2d 481, 488 (5th Cir. 1978).

Nonetheless, the affidavit arguably thus satisfies the relevant criteria for accrediting a confidential informant's report. Defendant correctly observes, however, that CI-3's information suffers from staleness.

Resch applied for the warrant on January 21, 1983.

As noted above, the crucial information supplied by CI-3 is undated, but inferentially appears to have been supplied no less than 100 days before the application. Evidence of association between Sanchez and certain known drug violators, or Sanchez and Tehfe -- at best corrobative information insufficient to establish probable cause -- is either undated or of similar vintage, except for the January telephone calls.

But even the comparatively recent evidence of association between Tehfe and Sanchez or Carcasses and Sanchez is weak. For the affidavit fails to establish either that Sanchez resided at, or was in January 1983 using for drug transactions, the premises at 517 22nd Street. CI-3's report claims "personal knowledge" that Sanchez was selling drugs from that address. The only arguable basis for that personal know-

ledge were the "conversations" mentioned in paragraph 40 between Sanchez and CI-3. Those conversations, as discussed above, occurred at the latest 3 to 4 months before the warrant was issued. Those conversations do not show that Sanchez lived at 517 22nd Street; had they shown residence, one might infer that residence and therefore Sanchez's use of the premises continued into the time period significant for probable cause purposes. The report of the conversations merely indicates that at some unspecified time months before the warrant application, Sanchez may have used the premises for drug transactions. CI-3's report gives no grounds for belief that Sanchez's use of the premises continued into a time zone meaningful to a determination of probable cause in January of 1983.

Thus the affidavit gives little or no reason to assume that Sanchez, or any other identifiable and legitimate suspect,

was using the target telephone to make or receive the telephone calls upon which the Government relies to update or corroborate the confidential informant's report.

If the Resch affidavit establishes probable cause, it is only through the report of CI-3. But defendant's argument that CI-3's report is stale is compelling.

As a general rule, probable cause to justify a search or wiretap must exist at the time the warrant is issued. Indeed, in Sgro v. U.S., 287 U.S. 206 (1932), the court held that proof of probable cause "must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." 287 U.S. at 210. Yet the question of the staleness of probable cause "depends more on the nature of the unlawful activity alleged in the affidavit than the dates and times specified therein," U.S. v. Harris, 482 F.2d 1115, 1119

(3d Cir. 1973). Our own Court of Appeals embraces the view of the Court of Appeals for the Tenth Circuit:

> The vitality of probable cause cannot be quantified by simply counting the number of days between the occurrence of the facts relied upon and the issuance of the affidavit... Where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant.

U.S. v. Johnson, 461 F.2d 285, 287 (10th Cir. 1972). See also U.S. v. Hyde, 574 F.2d 856,865 (5th Cir. 1978) (staleness "must be examined more liberally when a continuing pattern of criminal activity is alleged").

To argue that the Resch affidavit does not suffer from staleness, the Government relies principally upon two decisions from the Court of Appeals for the Fifth Circuit: U.S. v. Weinrich, 586 F. 2d 481 (5th Cir. 1978) and U.S. v. Hyde, 574 F.2d 856 (5th Cir. 1978). Close reading of these decisions and related

authorities descerns in them little support for the Government's position.

Whether the affidavit in support of a warrant application suffers from staleness depends on the facts of the particular case. See Sgro v. U.S., 287 U.S. at 210-11 (1932). This court cannot quarrel with the fundamental proposition that when the affidavit "clearly shows a long-standing, ongoing pattern of criminal activity," then the passage of time between essential events and the search warrant's issuance diminishes in importance. See U.S. v. Hyde, supra, at 865; U.S. v. Harris, 482 F.2d 1115, 1119 (3d Cir. 1973). But in the relevant cases, that showing of protracted and continuous activity is clear and detailed; moreover, it depicts or implicates in its details the target of the search warrant. See U.S. v. Weinrich, 586 F. 2d at 488-489; U.S. v. Hyde, 574 F.2d at 864; U.S. v. Harris, 482 F.2d at 1118-1119.

In the instant case, in contrast, the affidavit says very little about the supposed targeted telephone and its supposed owner, Adolfo Sanchez. The kind and dimension of information presented about Sanchez and about his use of the targeted telephone falls far short of the clear and detailed account of the target's activity in a case such as Weinrich. Where as in Weinrich the court justifiably found a clear showing of continuous and protracted activity sufficient to cure staleness, no such predicate exists in the instant affidavit upon which a court might downplay the staleness of information central to a finding of probable cause.

In Weinrich, a drug conspiracy case, the authorities obtained a warrant on February 18, 1977, to wiretap the telephone of one Neil Ryder. The supporting affidavit presented the report of two confidential informants. The affidavit stated that

the first source met with the agent-affiant on November 10, 1976, and at several succeeding meetings. The source identified Ryder as a large-scale drug dealer in the Tallahassee area and provided Ryder's address, telephone number and description of two of his vehicles.

The informant described in detail Ryder's operation, explaining that Ryder obtained Columbian marijuana from Tom Strang of Fort Lauderdale by traveling to Fort Lauderdale once or twice a week to purchase the marijuana in 75-100 pound quantities. Then, reported the informant, Ryder had the drugs taken to one Chuck Mitchell's house for packaging in 5 to 30 pound lots. The informant gave a physical description of Mitchell and his address and telephone number. He also provided detailed background information on Strang, Ryder's supplier, and named and described a West Coast cocaine dealer with

whom Ryder dealt. Moreover, the informant identified and described Strang's source. The informant further described a telephone code these individuals, including Ryder, employed. Finally, the source named a series of individuals who had purchased marijuana from Ryder -- among them one Jerry Jennings. In an attempt at corroborating the source's report, the affidavit recited that Jennings had been arrested for possession of 25 pounds of marijuana Ryder's name and telephone number were found in Jennings' address book. Moreover, Ryder posted, according to the affidavit, a cash cond for Jennings' release.

Finally, the affidavit reported that subpoenaed telephone records revealed frequent telephone calls among Ryder and his cohorts, both suppliers and partners.

A second confidential informant had reported, on January 18, 1977, that he had been associated with Ryder and Strang and

purchased substantial quantities of marijuana from Strang. Along with confirming much of CI-1's report, CI-2 also related that he frequently stayed at the Strang residence and on one occasion had observed Ryder purchasing marijuana from Strang.

The first confidential informant's report was, at most, 100 days old. The second's was 30 days old. The Court of Appeals had no trouble dismissing defendants' charge of staleness; the second informant's tip was but one month old; the detailed informant's reports coupled with telephone records justified the conclusion that the affidavit presented an extensive and continuing criminal enterprise, involving Ryder and his targeted telephone.

In comparison with the affidavit under attack in Weinrich, the Resch affidavit makes a poor showing, if any showing at all, of a continuing enterprise involving

Sanchez and his targeted telephone. All that the Resch affidavit tells the reader is that an informant supplied information in or before October 1982 that Sanchez and the informant had discussed a drug transaction at some unspecified earlier time. The affidavit does recite drug-related activities of other individuals that arguably appear "continuous and protracted." But it does not give any detail of facts showing Sanchez to be a part of these ongoing activities, unlike the affidavit in Weinrich.

Similarly, in U.S. v. Harris, supra, the supporting affidavit depicted many and various activities of Harris over a period of time not specified in the court's opinion. While the court did not clearly identify the time periods asserted by defendant to show staleness, it answered the staleness argument with the following description of the affidavit:

> The affidavit contained information concerning the scope of appellant's illicit activities, the identity and location of the primary source of the narcotics, and the name and address of the financial backer. The magistrate was also furnished in the affidavit the information to the effect that the confidential informants had personally observed unlawful activities on the part of Harris, had overheard telephone conversations concerning the purchase and transportation of the drugs, and that one of the informants was actively involved in the Harris narcotics organization.

482 F.2d at 1118-1119.

Moreover, the affidavit in Harris described in detail a series of evasive actions by defendant in the time period immediately prior to his arrest. See Harris, supra, 482 F.2d at 1116-1117, 1119. Timely information showing attempts to evade arrest and evidencing narcotics' possession coupled with assertedly stale but detailed information as to the target's narcotics' operation, does demonstrate the protracted and continuing activity that cures staleness. The Resch affidavit neither shows

current suspicious or criminal behavior by Sanchez (or anyone else linked to the target premises), nor does it depict in any detail ongoing criminal activity by Sanchez or any other person shown to reside at or utilize the 517 22nd Street premises or telephone.

A comparison of the case at bar with U.S. v. Hyde, 574 F.2d 856 (5th Cir. 1978), similarly demonstrates the paucity and staleness of the information in the Resch affidavit. In Hyde, the information contained in the affidavit against the target of the wiretap came from four separate and independent informants. The court estimated that the information was between 36 and 48 days old. The affidavit in Hyde contained information plausibly showing that Hyde was part of a conspiracy to two years' duration. Once again, the Resch affidavit provides no facts sufficient to portray Sanchez as a participant in what-

ever asserted ongoing criminal enterprise the affidavit attempts to depict.

Under the New Jersey wiretap statute, N.J.S.A. 2A:156A-1,[5] a warrant application

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[5] 2A:156A-9. Application for order; contents

Each application for an order of authorization to intercept a wire or oral communication shall be made in writing upon oath or affirmation and shall state:

c. A particular statement of the facts relied upon by the applicant, including: (1) The identity of the particular person, if known, committing the offense and whose communications are to be intercepted; (2) The details as to the particular offense that has been, is being, or is about to be committed; (3) The particular type of communication to be intercepted; and a showing that there is probable cause to believe that such communication will be communicated on the wire communication facility involved or at the particular place where the oral communication is to be intercepted; (4) The character and location of the particular wire communication facilities involved or the particular place where the oral communication is to be intercepted; (5) A statement of the period of time for which the interception is required to be maintained; if the character of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular statement of facts establishing

must satisfy the traditional requirements of probable cause, codified both in the state and the almost identical federal statute, 18 U.S.C. §2518.

A very generous reading of the Resch affidavit descerns a barely sufficient showing of probable cause to believe that defendant Sanchez was, at some unspecified time more than four months before the application, involved in drug transactions.

The affidavit does not sufficiently link Sanchez to the target premises and communication facility to satisfy the particular nuances of probable cause spelled out in the federal and state statutes. But even assuming the adequacy

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probable cause to believe that additional communications of same type will occur thereafter; (6) A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ.

of the affidavit on that score, the court holds that the information essential to a finding of probable cause -- CI-3's report -- was fatally stale. The Resch affidavit fials to establish the requisite probable cause to intercept communications at 517 22nd Street, and therefore the evidence gathered from that intercept must be suppressed.

III. Franks Hearing.

Defendant Sanchez charges that the Resch affidavit contains a willful material misrepresentation as to Sanchez's criminal record, and that such a misrepresentation ultimately compels suppression of the evidence.

The Resch affidavit states that

> A criminal record check conducted on Adolfo Sanchez has (sic) an extensive record of arrests for various violations of the drug laws of this state. The most notable of these occurred on October 21, 1971, when he was arrested for the possession of two (2) kilograms of heroin, a charge for which he ultimately was convicted.

In briefs submitted to the court, Sanchez asserted that his arrest record shows only two arrests -- hardly an "extensive" record of arrests. Moreover, his one conviction was for conspiracy to possess cocaine, not for possession of heroin.

The court held a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978), to aid in determining whether affiant Resch knowingly misrepresented Sanchez's record, or described that record with reckless disregard for the truth.

The hearing testimony suggests that the affiant paid little heed to distinctions between a short and long arrest record. The record also suggests, however, that Resch had some reasonable basis for affirming that Sanchez had been convicted for possession of heroin.

The court concludes that the affidavit badly mischaracterized Sanchez's

record, but that mischaracterization does not, or would not, alter any reasonable assessment of the affidavit's capacity for establishing probable cause. The significant germ of information is Sanchez's prior involvement in narcotics dealing. Mischaracterizing the extent of his record and his conviction does not change the fact that Sanchez had been arrested and convicted for narcotics' offenses.

Thus, the court finds that no Franks problem affects this affidavit.

A. Did Government Make Necessary "Necessity" Showing Under 18 U.S.C. $ 2158(3)(c) and N.J.S.A. 2A:156A-10.

Defendant argues that evidence from the wiretap on his phone should be suppressed because the affidavit of Pamela Resch supporting the application failed to establish the need to wiretap.

As required by 18 U.S.C. $ 2518(3)(c), the issuing judge found on the basis of the application before him that "normal

investigative procedures have been tried and reasonably appear unlikely to succeed, if continued."

In the Armocida decision, the Court of Appeals for the Third Circuit held that the statutory burden of establishing compliance with § 2518(3)(c) is not great, 515 F.2d at 38; see also United States v. Sean, 545 F.Supp. 799 (D. Del. 1982), and requires "only ... that there exists a factual [as opposed to conclusory] predicate in the affidavit to support the finding. 515 F.2d at 38; United States v. Vento, 533 F.2d 838, 849 (3d Cir. 1976).

Here, the Government made an adequate showing that other methods were unlikely to succeed. The Resch affidavit cites a complete history by the DEA and the Hudson County Prosecutor's office of physical surveillance, utilization of numerous informants, undercover agents, telephone toll and pen register analyses, among

other investigative techniques. The court is satisfied that the affidavit established the required factual predicate for a finding of necessity.

IV. Minimization.

Under the statute, 18 U.S.C. §2518 (5), every intercept order must contain a minimization provision [to minimize interception of "innocent" conversations]. U.S. v. Giordano, 416 U.S. 505 (1974) requires suppression when "there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures." See U.S. v. Scully, 546 F.2d 255, 262 (9th Cir. 1976), vacated on other grounds, 430 U.S. 902 on remand, 554 F.2d 363, cert. denied, 434 U.S. 870, quoting U.S. v. Giordano, 416 U.S. at 527. (Emphasis added.)

When the record shows hundreds of

interceptions, and the court has the tapes, transcripts of the tapes, and logs of the interceptions, for review, and the court holds a hearing in which the supervising agent or supervising attorney is subject to examination on compliance with the minimization requirement, then the court need not examine each and every interception. Nor must the court include in the hearing all of the translators or officers who monitored conversations. U.S. v. Scully, 546 F.2d at 263.

When a complete disregard of the statute's requirements is not claimed, compliance with the minimization requirement is to be ascertained by determining whether a good faith effort to minimize was attempted. It does not appear that defendant(s) allege complete disregard. U.S. v. Armocida, 515 F.2d 29,43 (3d Cir. 1975). When the conspiracy is large scale, it may be necessary for the

Government to intercept a correspondingly higher number of conversations, Id. at 44, particularly where, as here, the wiretap is designed to identify other participants and to determine the conspiracy's scope. Id. Somewhat greater latitude is allowed when conspirators converse in a colloquial code, thereby creating superficially innocent conversations. Id.

Finally, brief interceptions -- e.g., less than two minutes -- do not violate minimization requirements, when it may take that amount of time to discern the quality of a conversation. Id.

Defendants do not appear to allege that the Government wholly ignored or flouted the requirement to minimize. Nor could defendants plausibly make such an assertion, given the testimony and statistics the Government presented at an evidentiary hearing on the minimization issue. Rather, defendants allege that the

Government failed to make a good faith and substantial effort to minimize interception of innocent conversations.

According to defendant Tehfe, between January 28, 1983 and February 1, 1983, 72% of the conversations were non-pertinent, and 66% of these were not "minimized." From February 1, 1983 to February 5, 1983, 53% of the total interceptions were non-pertinent, and 62% of those were not minimized.

The Government's statistical summary shows the following:

	SANCHEZ	TEHFE
Total Number of Interceptions	656	467
Total Number of Interceptions Involving Actual Conversations (excluding items such as wrong numbers, busy signals, no answers, phone off the hook, etc. ...)	480	328
Total Number of Conversations Involving Narcotics	95	122

	SANCHEZ	TEHFE
Total Number of Conversations Not Involving Narcotics	385	206
Total Number of Non-Pertinent Conversations Minimized	179	58
Total Number of Non-Pertinent, Non-Minimized Conversations Under Two Minute Duration	176	111
Total Number of Non-Pertinent, Non-Minimized Conversations Over Two Minute Duration	30	37

Government Exhibit G-1

The Government adduced credible testimony at the hearing that the alleged co-conspirators utilized a code to disguise the narcotics terms used in intercepted conversations. T. 38-40, May 9, 1983.

Specifically as to the Tehfe wiretap, the record also reveals that the taped conversations transpired principally in Lebanese and Spanish. For the Lebanese (Arabic) conversation, the Government had to utilize State Department contractors

fluent in Arabic but unschooled in the ways of law enforcement. T. 24, May 9, 1983. Thus such personnel cannot reasonably be expected to have differentiated easily between innocent conversations and drug-related conversations.

Finally, the record shows that the authorities suspected that all occupants of the Tehfe house either participated in or knew about John Tehfe's alleged drug business. T. 40-41, May 9, 1983. Therefore, no conversation would appear automatically innocent simply because it involved an "innocent" family member.

As to both the Sanchez and Tehfe tapes, Special Agent Nolan, the DEA "case agent" in the subject investigation, provided credible testimony regarding the briefings given to the wiretap monitors and the rules by which those monitors were instructed to operate. T. 26-29, May 9, 1983.

On the basis of that testimony, and with due regard for the small number of intercepted, non-pertinent conversations of over two minutes' duration, the court holds that the Government made a substantial, good faith effort at minimization with a satisfactory degree of success, both on the "Sanchez" and "Tehfe" wiretaps.

V. Conclusion.

In sum, the court holds that the affidavit supporting the application for a warrant for the "Tehfe" wiretap satisfied the probable cause requirements set forth in 18 U.S.C. § 2518. Furthermore, that affidavit demonstrated the requisite necessity for resort to electronic interception; finally, the Government appropriately and satisfactorily minimized the interception of non-pertinent conversations.

As for the "Sanchez" wiretap, the supporting affidavit fails to establish the requisite probable cause, and the

issuing magistrate erred in finding in that affidavit such a showing. That supporting affidavit, however, did establish the necessity for recourse to wire interceptions; in addition, the responsible Government officials appropriately and satisfactorily minimized the interception of non-pertinent conversations.

Accordingly, the motion to suppress the intercepted conversations from the "Sanchez" wiretap will be granted. The motion to suppress the interceptions from the "Tehfe" wiretap will be denied.

The accompanying order will be entered.

/s/JOHN F. GERRY, U.S.D.J.

DATED: June 14, 1983

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA :

v. : Criminal No. 83-37

JOHN TEHFE, et al. :

ORDER

This matter having been opened to the Court upon application of W. Hunt Dumont, United States Attorney for the District of New Jersey (Thomas G. Roth, Assistant U.S. Attorney appearing), and defendant Adolfo Sanchez having appeared through counsel Paul Casteleiro, Esq.,

IT IS on this 20th day of July, 1983,

ORDERED that the Government's motion for reargument and reconsideration of that portion of the Court's order filed June 15, 1983 granting defendant's motion to suppress telephone conversations over the Sanchez Wiretap be, and is, hereby denied.

/s/ Honorable John F. Gerry
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	: TRANSCRIPT OF PROCEEDINGS
VS.	:
	CRIMINAL NO.
JOHN TEHFE, SAMIR TEHFE, ALI BAZZI, BASSAM ISSA,	: 83-37
NABIL NEHMI, ADOLFO SANCHEZ, BENNY RODRIGUEZ,	: [Government's Motion for Re-
LUIS HERRERA, SAMIRA TEHFE, JOSE LUIS PEREZ,	: consideration of Order Suppressing
LUZ RODRIGUEZ-PEREZ,	: Evidence.]
Defendants.	:

. . .

THE COURT: Well, I must say that I'm impressed with the Government's diagram. I don't mean to be cavalier about it because I know it's designed to assist and accomodate the Court, but I can't resist commenting upon its sinister appearance apart from its substantive assistance. It looks like some kind of a bug proceeding from right to left, and an evil looking devil it is. If one concentrates on 517 22nd Street, which

the Government would not have us do to the extent that we have done so, the premises look very sinister. It looks like some kind of spider with hairy legs going out in all directions.

So, it may well be that the time spent on that diagram will not have ultimately proven wasted, but I will give you the opportunity to ulilize it again perhaps at some other level. I appreciate it, and I understand its purpose. It does help to illustrate the Government's position more graphically.

The Government moves for reconsideration of the Court's order suppressing the product of a telephone wiretap at the premises at 517 22nd Street, Union City, New Jersey, (Telephone number Area Code 201 865-8677). The United States attorney argues first that the court improperly reviewed the application for the Sanchez wiretap de novo rather

than according due deference to the determination of the issuing judge.

Second, the Government urges that the Court erroneously analyzed the Sanchez wiretap application portion-by-portion rather than as an assertedly coherent whole. The Government argues that the common sense approach found in the Supreme Court's recent decision in Gates v. Illinois, decided by the High Court, June 8, 1983, compels a result contrary to the Court's conclusion in its opinion and order on the defendant's suppression motion.

Finally, the Government invites the Court to recognize and fashion, for the first time in this circuit, a good-faith exception to the exclusionary rule.

In this Court's view, a reasonable and rational appraisal of the affidavit supporting the warrant at issue must fail to discern probable cause

at the time of the issuance of the warrant. Nothing in the affidavit demonstrates a substantial or fair probability that Sanchez or any other named individual was, at the time of the application, utilizing the subject premises and communications facility for the purpose of conducting narcotics transactions.

The cryptic account of CI-3's (the unnamed informant) report on Sanchez's activities might well, in the same hyper-technical manner eschewed by the Gates court, satisfy a formalistic notion of probable cause to believe that at some unidentifiable time, months before the application, Sanchez and Gueche dealt in narcotics at the subject premises. However, it does not appear "arbitrary" to conclude, on the basis of recent but sketchy evidence of mere association between Sanchez or the

premises, on the one hand, and known narcotics violators, on the other, that a four-month-old non-detailed anonymous report ripens into a timely showing of probable cause. See U.S. v Leon, 82-1093, The Ninth Circuit Court of Appeals, decided January the 19th of this year, per curiam opinion, cert granted, No. 82-1771, June 28, 1983.

The Gates opinion does recommend the employment of "Common Sense," but a common-sense approach neither requires nor invites a wholesale relaxation of those powers of analysis that discern the presence or absence of substantially probable connections between disparate events.

The Government appears to suggest that the use of the "Present Perfect Tense" in the affidavit's description of CI-3's report might justify a magistrate's conclusion that the affidavit timely

showed probable cause. Indeed, the use of a particular tense, in the absence of other indications, might give rise to an inference of ongoing activity or intelligence. But in the presence of statements suggesting that CI-3 made his report before October, 1982 the inference the Government recommends becomes arbitrary and unreasonable.

The several authorities the Government cites on the staleness issue do not pursuade the Court ot change its view.

In U.S. v. Minis, 666 F.2d 134, decision of the Fifth Circuit Court of Appeals 1982, a conspirator's admission in July that he was growing marijuana, established probable cause in October; but according to the admission, the plants were 18 inches high in July and would reach four to five feet in height at maturity, that is, in early autumn. The biological process entailed a

continuity and duration that firmly established probable cause in October.

In U.S. v. Perry, 643 F.2d 38, the Second Circuit in 1981, three-year-old information showing probable cause to search a house was revivified by very recent police observation of attempts to frustrate surveillance. The defendant's installation of telephone cameras that would survey activities outside his house, rapid flight by visiting automobiles upon the sighting of police officers and so on. Moreover, the defendant's mother, who resided in the target premises, made a veiled but arguable -- and very recent-- admission that the defendant did illicit business in the house.

See also U.S. v. Dennis, 625 F.2d 732, at page 792 for appropriate discussion out of the Eighth Circuit 1980, in which year-old information on defendant's loan-sharking was updated by a six-day-old

surveillance of defendant making collections -- from which a fairly substantial enference of criminal activity could be drawn.

The Government relies on cases in which recent information either describes or strongly suggests the performance of criminal acts: in the instant affidavit, the recent information at best suggests association.

According to the Government, six of the seven individuals named in the warrant had some demonstrated link to the subject premises; e.g. they once stopped by there or they telephoned there. But with the exception of the report of CI-3 regarding Sanchez, none of the reported links describe any criminal activity.

The affidavit, in short, contains no substantial basis for a conclusion that probable cause existed at the time of the application. A conclusion to the

contrary is arbitrary and unreasonable, and thus the court declines to alter its conclusions.

Finally, the Government invites the Court to hold the exclusionary rule inapplicable to law enforcement action taken in good faith pursuant to a warrant -- an invitation I respectfully decline. But even were the court favorably disposed to the Government's request, the instant case presents a less-than-compelling record for arguing the presence of good faith.

The affiant, Pamela Resch, starkly mischaracterized defendant Sanchez' prior arrest record -- which included a mere two arrests -- as "extensive." Faced with the defendant's allegation of a deliberate misrepresentation by Resch, the Court held a hearing pursuant to Franks v. Delaware.

After hearing Ms. Resch's testimony, the Court stopped short of concluding that she had deliberately lied about Sanchez' record.

But in describing Sanchez' rather brief record of arrests for New Jersey drug offenses as "extensive," Ms. Resch took alarming liberties with the English language. Her plain overstatement relied upon by the Government now to argue the sufficiency of the instant affidavit might raise some not insubstantial doubts about the ability of the Government to establish "good-faith" in the instant case, (quite apart and independent of the suggestions by defense counsel during the course of their arguments this morning). Justice White, concurring in Gates, suggests that the question of good faith in a search pursuant to a warrant might resemble the inquiry under Franks v. Delaware.

Simply because this Court found no violation of Franks, however, it does not follow that the mischaracterization by Resch would be innocuous for

the purposes of discerning the presence or absence of governmental good faith in the matter of the instant wiretap.

In sum, the Court will deny the Government's motion for reconsideration. The Government will submit an appropriate order consistent with this opinion.

Thank you, counsel.

Office - Supreme Court, U.S.
FILED
MAR 6 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1281

In the Supreme Court of the United States

OCTOBER TERM, 1983

ADOLFO SANCHEZ AND LUIS HERRERA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

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ADOLFO SANCHEZ AND LUIS HERRERA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in reversing an order suppressing evidence secured from a court authorized wiretap.

On March 10, 1983, petitioners were charged in one count of a 22-count-indictment returned in the United States District Court for the District of New Jersey with conspiracy to possess heroin with intent to distribute, in violation of 21 U.S.C. 846. Petitioner Sanchez was also charged with four counts of using a telephone to facilitate a conspiracy to possess heroin with intent to distribute, in violation of 21 U.S.C. 843(b). On June 14, 1983, the district court suppressed evidence obtained from a wiretap authorized by a state court judge. It held that the issuing court had erred in finding that the supporting affidavit established the requisite probable cause to support the wiretap order (Pet. App. 14a-69a). The court of appeals reversed, relying on *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), and concluding

that the state court judge did not err in finding that the affidavit contained sufficient information to establish probable cause (Pet. App. 1a-13a).

Petitioners contend (Pet. 18-19) that the court of appeals applied the wrong standard of review. Petitioners also contend (*id.* at 19-23) that the affidavit for the search warrant did not establish probable cause to authorize the interception of the telephone calls. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court.[1] The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to suppress. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If on the other hand petitioners are convicted and their conviction is affirmed on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of the final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MARCH 1984

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[1]It is now almost a year since the return of the indictment. Further interlocutory review at this time would cause additional delay in trial of the charges against petitioners.

[2]Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

DOJ-1984-03

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